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Supreme Court, U.S.
FILED
MAR 2 1 2004
OFFICE OF THE CLERK

No. 03-1412

IN THE
Supreme Court of the United States

Coastal Petroleum Company, Charles E. Arnold, et al., and Robert W. Clark, et al.,

Petitioners,

v.

State of Florida, Department of Environmental Protection, and Board of Trustees of the Internal Improvement Trust Fund

Respondents.

Petition for Writ of Certiorari to the District Court of Appeal, First District, State of Florida

REPLY BRIEF

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CORPORATE FILER PROVISION

Pursuant to Supreme Court Rule 29.6, Coastal Petroleum Company, as a corporate filer, hereby states that as listed in its Petition for Writ of Certiorari, Coastal Caribbean Oils & Minerals, Ltd. is its parent company.

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REPLY BRIEF

1. Supreme Court Review Is Appropriate.

Coastal included a reservation of federal issues in its complaint in state court, however, that reservation was ignored by the trial court and the State. Because of federal case law and issues raised by the court and State in the trial proceedings, Coastal is forced to bring this Petition to ensure its federal claims will be heard.

The State wants it both ways: no Supreme Court review **because of** the reservation and no subsequent federal trial **despite** the reservation. The State asks this Court to

deny jurisdiction based upon a reservation it refuses to concede is valid. (Brief in Opposition at 5 FN3) The position stated in footnote 3 of the Brief in Opposition is just the reason Coastal was forced to file its Petition with this Court. Coastal included a reservation in its complaint, but federal law and issues were raised by the Respondents and the trial court such that if Coastal merely filed suit in federal trial court, the State would argue as it does in its brief, that Coastal's reservation did not fully preserve its federal claims. (Brief in Opp. at 4-5). The State cannot be allowed to use Coastal's reservation as a mechanism to completely deny Coastal any federal forum in which to address its federal claims.

Property owners are compelled to bring their takings claims first in state court because of federal ripeness requirements. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 194-97 (1985). Should the state court not find a taking, upon filing a federal takings claim in federal court, the property owners face arguments such as those foreshadowed in the Brief in Opposition. *See generally*, *Fields v. Sarasota Manatee Airport Authority*, 953 F. 2d 1299 (11th Cir. 1992). In the Eleventh Circuit, a reservation has been recognized by which a party can preserve its federal takings claim without first filing in federal court, by making a reservation on the record in state court. *Jennings v Caddo Parrish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. den.*, 429 U.S. 897 (1976).

Coastal sought to preserve the right to have a federal trial court review its federal claims by including a *Jennings* reservation in its complaint. (Record at 24 [Complaint]) However, during the trial proceedings, the trial court and the State ignored that reservation. They used federal precedent based upon and interpreting the Fifth Amendment to the United States Constitution to reduce the scope of

constitutional protection against the taking of private property without payment of compensation. (Petition Appendix at 204-05) In particular, the State argued that an agreement to comply with permitting laws and regulations transformed the regulations into background principles, inherently limiting the property. (Pet. App. at 22 [Trustees' Answer], at 25 [DEP Answer]) The trial court accepted the arguments and concluded that the property became conditional and constitutionally unprotected against a taking until a permit had been obtained. (Pet. App. at 5,7 [Final Judgment])

Despite Coastal's reservation, the federal precedent raised, distorted and applied by the trial court and the State forced Coastal to Petition this Court to address these issues or face the argument that no federal issues remained to be addressed. (Brief in Opp. at 5 FN3) Coastal does not have the luxury of waiting to see if a federal trial court will decide that the trial court and State sufficiently raised federal issues so that they should have been addressed here on certiorari rather than in a subsequent federal proceeding. *See, Adams v. Robertson,* 520 U.S. 83, 88 (1997) (regarding the raising of federal issues through the reliance on federal cases).

For years the State has sought to delay or prohibit drilling until either the leases or Coastal expired. The State has succeeded so far and should not be allowed to simply wage a war of attrition because it has the unlimited resources to do so. The constitutions of both Florida and the United States demand otherwise.

Supreme Court review is appropriate to ensure that Coastal's federal claims will be heard by a federal court.

2. The Misstatements Of The Law Cannot Be Allowed To Stand.

The State clearly misread Coastal's Petition if it believes there were only allegations of misapplication of "properly stated rule of law." (Brief in Opp. at 5) In its Petition, Coastal alleges that the lower court's reading of this Court's decisions was not "properly stated rule of law," but was a "gross distortion" of the law. (Petition at 19) Much more than mere misstatements of law though, the trial court attempted to turn back time and ignore modern regulatory takings law. (Pet. at 14) Those distortions or "misstatements" of law are foundationally erroneous and cannot be allowed to persist.

The entire focus of the proceeding below was incorrect and is encapsulated in the Brief in Opposition. The focus of the trial should have been on the effect of the application of the regulation to the property. *See*, *State v. Burgess*, 772 So. 2d 540, 542 (Fla. 1st DCA 2000) Instead the focus of the trial was on the effect of Coastal's agreement to abide by the law. The State and trial court were focused on whether or not the property was subject to regulations when the trial should have focused on what effect the application of those regulations had on Coastal's lease. *Id.* This misplaced focus is summed up in the Respondents' reliance on *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), to show that an oil and gas lease is **subject to** existing and future conservation regulations. That does not end the inquiry in a takings case, it is the beginning point from which the effect of the regulations is determined. Even so, in that case Mobil received compensation when the government that sold it the lease subsequently prohibited the only use under the lease. *Id.*

Respondents' citation to several cases in which this Court dealt with single use property actually supports Coastal's reasons for granting the Writ of Certiorari. As set out in the Petition, this case offers the unique opportunity to address important questions without the clutter of questions about other possible uses. The single use property takings cases cited by the Respondents are some of the most often cited and quoted cases in regulatory takings jurisprudence, if not all takings jurisprudence. Hardly a takings case is written without citation to *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and the others, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), have been cited literally hundreds of times as well. This case too offers the Court a unique opportunity to cleanly address issues and it could also become a benchmark case in regulatory takings law.

There are several issues that should be determined in this case that would have lasting impact in takings law. One of the central questions to be addressed is whether regulations can become background limitations on property through the passage of time or agreement to abide by the law. (Pet. at i) Another is whether one has the right to use property in a given way before the government grants that right through a permit or whether that use springs to being upon issuance of a permit. Still another is whether the State may avoid a taking simply by claiming that its current policy prohibiting the use of property may change. (Pet. at i) Maybe the most basic issue to be addressed is whether the State may deny the only use for a single use property it sold to Coastal without paying compensation.

In an attempt to show detailed evidentiary findings, the State quotes four paragraphs of the Final Judgment in its Brief in Opposition, those paragraphs are actually telltale

manifestations of an underlying blanket assumption. (Brief in Opp. at 7-8) Clearly, the State used policy to deny Coastal's drilling permit. (Pet. App. at 53 [Final Order]) Subsequently at trial, no evidence was presented nor assurances given that the policy would change or not be applied. Despite the application of that policy and the denial of a permit for the only use of the lease, the Court determined that there was no diminution in value and that since the property was larger than this one location, Coastal should apply for a permit elsewhere. The necessary assumption underlying those findings is that the known policy either would change or would not be applied to other locations. The State offered no evidence to support either conclusion. That is evidence of blanket assumptions, not detailed evidentiary findings. Coastal is not ignoring the Final Judgment (Brief in Opp. at 2), but is trying to expose the rationale and assumptions which gave rise to it, and which were omitted from the Final Judgment prepared by the State.

Essentially the State would be happy to carve away at Coastal's property by refusing to allow drilling on a piece at a time, until finally the lease expires - all the while portraying their action as limited to individual locations. The law protects property owners against such incremental takings and does "not require the submission of further and futile applications" to use property. *See*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001). It is absurd to say Coastal cannot drill where it expects there is oil, but may be able to drill somewhere else whether oil is expected there or not.

The State's suggestion that since there is no **express** policy applicable to this lease means that their use of policy on a case by case basis is limited to one location is hollow. (Brief in Opp. at 7) The State's application of policy to overcome facts is as applicable to one location as any other location since the entire lease is comprised of similarly

situated submerged lands offshore Florida. The State's attempt to portray its policy in piecemeal style is illogical and meant only to escape liability for compensation. That certainly is not the way the State has portrayed its policy to the public and to the federal government. (Pet. App. at 181 [Plaintiff's Exhibit 1402 – Letter from Governor Bush to Secretary of the Interior]) The State is acting like a hooked fish that will try any trick or maneuver to get off the hook and avoid being caught.

The gross distortions and ignoring of federal precedent by the trial court is properly addressed to this Court and should not be allowed to stand.

3. This Case Does Not Require A Highly Particularized, Fact-Based Decision.

By attempting to eschew the broad implications of its policy, decision and actions toward Coastal, the State tries to cast this case as a run of the mill regulatory takings case. Coastal is not here contesting the erroneous factual findings of the lower court, but its gross distortion and misapplication of federal takings law that was originally created by this Court in interpreting the Fifth Amendment to the United States Constitution.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court created an exception to the fact specific inquiry used in regulatory takings cases. While the "default rule" requires "a more fact specific inquiry," "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value... ." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332 (2002). This is just such an extraordinary case. Through its indefinitely applied policy, the State has

permanently deprived Coastal of the only use it ever had through its time limited lease. The State's argument for application of a fact specific inquiry is based squarely on its pathological denial before courts of the existence and effects of its policy.

It is disingenuous at best for the State to continue to brandish its policy against offshore drilling to the whole world and to deny it before the courts. John Kerry recently discovered how dearly that policy is held by the State when even the possibility that he might have suggested drilling in the Gulf of Mexico off Florida's Coast was attacked by Governor Bush and later refuted by Kerry's campaign as an obvious mischaracterization. *See*, Clark, *Kerry in Spat on Florida Oil Drilling*, The Miami Herald, Apr. 22, 2004. ("'There's probably 10 percent of the people of this state that would support a candidate for higher office that believes what John Kerry believes,' Bush said.") The State's policy is notorious and continues today.

The State is not stupid though. It does not want drilling, but it does not want to pay for a taking either, so it presents itself as walking a tightrope. It only reveals glimpses of its underlying policy as needed to prevent drilling, while denying the existence of the policy to prevent the finding of a taking. It clearly recognizes that a "blanket prohibition" may have been overturned, (Brief in Opp. at 7), or would have been a blatant taking, but without the use of policy it would have been forced on the facts to issue the permit to drill.

The only extensive fact finding in these proceedings was by the Administrative Law Judge when she found, based upon 52 pages of factual findings, that Coastal should be issued a permit to drill. (Pet. App. at 55-132 [Recommended Order]) The State used policy to balance those facts away and deny the permit to drill. (Pet App. at 53 [Final Order])

Faced with the possibility of the policy resulting in a taking, the State retreated into facts, claiming they controlled the taking determination. The critical fact here is, the State's application of policy, "based on its determination that there is a compelling public purpose in not allowing [Coastal] to drill off shore, effectively prevents [Coastal] from exercising its rights under the contract." *Coastal Petroleum Co. v Florida Wildlife Federation*, 766 So. 2d 226, 228 (Fla. 1st DCA 1999). All use of the lease being denied, the *Lucas* categorical analysis is the proper analysis to use, not a fact specific inquiry.

The State recites the number of exhibits and days at trial for the proposition that it was a factual decision which is not appropriately addressed by this Court. What the State fails to point out is that immediately following that presentation of evidence and closing arguments, the trial judge made his oral pronouncement and decided the case from the bench. He was able to do that at least in part because of the interpretation he stated just prior to announcing his decision, that the *Tahoe-Sierra* case held that temporary moratoriums do not effect a taking. (Pet. App. at 204-05)

This case is not a highly particularized, fact-based decision and requires nothing more than the proper application of the "properly stated rule of law" as to categorical takings as set out in *Lucas*. This case is, however, extremely important given the impact it can have on takings law and the potentially billions of barrels of oil resting off of Florida's coast. (Pet. at 18)

CONCLUSION

Certiorari should be granted to review the judgment of the First District Court of Appeal, State of Florida in *Coastal Petroleum Company v. State of Florida, et al.*, 864 So. 2d 402 (Fla. 1st DCA 2004).

Respectfully submitted,

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May 21, 2004